PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120

Petition of DRIVE for a Declaratory Order	**Public Meeting April 20, 2023**
Regarding the Expansion of its Community	**3025296-OSA**
Broadband Network	**Docket No. P-2021-3025296**

STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of several Rural Local Exchange Companies (RLECs) filed in response to the Initial Decision on Remand issued in the above-captioned proceeding. Replies to Exceptions were filed by Driving Real Innovation for a Vibrant Economy (DRIVE)[1] and the Office of Consumer Advocate.

DRIVE seeks declaratory relief that, *inter alia*, its broadband expansion project is not prohibited by Section 3014(h) of the Public Utility Code (Code). Section 3014(h) of the Code essentially establishes a right-of-first refusal (ROFR) process for political subdivisions seeking to provide broadband service in Pennsylvania.[2] DRIVE previously received declaratory relief that its project to deploy a broadband network in Montour County, Pennsylvania was not prohibited by Code Section 3014(h).[3] DRIVE has since expanded its broadband network into Columbia, Northumberland, Snyder, and Union Counties and now seeks declaratory relief regarding the expansion project.

I agree with granting DRIVE's Petition for Declaratory Order that, *inter alia,* it complied with the requirements of Section 3014(h) with its expansion project. However, because I do not agree with the discussion in the Motion on the "linkage" issue, I will be concurring in result only.

One of the primary issues that arose in this case is whether Chapter 30 requires "linkage" or a nexus between the service requested by a political subdivision in a ROFR letter and the network ultimately deployed by the political subdivision after the service request was declined. While requiring "linkage" between the service requested and service deployed appears reasonable on its face, I do not believe it is the law.

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[1] DRIVE is a council of governments created to provide joint economic development services to Columbia and Montour Counties. Subsequently, DRIVE was joined by Northumberland, Snyder and Union Counties.

[2] DRIVE acknowledges that it is a political subdivision, or an entity established by a political subdivision, as defined at 66 Pa. C.S. § 3012. As such, Code Section 3014(h) prohibits DRIVE from providing broadband services within the service territory of an Incumbent Local Exchange Carrier unless the carrier declines a written request for the timely deployment of the service at the requested connection speeds. *See* 66 Pa. C.S. § 3014(h)(1), (2).

[3] *Amended Petition of DRIVE for a Declaratory Order That Its Construction and Operation of a Community Broadband Network (A) Is Not Subject to the Prohibition of 66 Pa. C.S. § 3014(h) and (B) Would Not Subject DRIVE to the Commission's Jurisdiction as a Public Utility*, Docket No. P-2018-3006603 (Order entered February 28, 2019).

I agree with the Initial Decision on Remand that Section 3014(h) of the Code does not require "linkage." As noted in the decision, if the General Assembly had intended for there to be some linkage between the service requested and the network deployed, it could have written Chapter 30 to say so. It did not, and I agree it should not be read into the statute as part of this proceeding.

Section 3014(h) of the Code permits a political subdivision to deploy broadband if it requests that an incumbent carrier deploy the service and the carrier does not agree to the request.[4] Consequently, the key from a broadband speed perspective is *not* that the political subdivision deploy the same service as the incumbent, but rather, that the political subdivision deploy *broadband* as defined by Chapter 30. Here, the record evidence shows that DRIVE's network supports the provision of broadband service at speeds well beyond those contemplated by Chapter 30. In fact, for many addresses in the expansion area, DRIVE's network supports the provision of broadband service at the same 50 megabits per second (Mbps) downstream speed requested by DRIVE in its ROFR letters to the RLECs.[5] Thus, I view DRIVE's ROFR letters as a legitimate service request in compliance with the Code, not as an attempt to gold-plate the network.

I do not believe Chapter 30 requires "linkage" with network types either. DRIVE owns and operates a "middle mile" network that currently serves Wireless Internet Service Providers that, in turn, provide broadband service to end users using their "last mile" networks. Section 3014(h)(2) of the Code governing ROFR requests does not differentiate between "middle mile" and "last mile" networks or services. Moreover, applicable law does not impose a requirement of technological detail and certainty in a ROFR request. For example, Section 3014(h)(2) does not discuss a political subdivision's deployment plan and does not require a political subdivision to have a deployment plan at the time it issues a ROFR request. Applicable law requires only that a ROFR request state the broadband speeds to be deployed by the ILEC and the areas where that speed is to be deployed,[6] which is what DRIVE did in its ROFR letters.

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[4] The relevant RLECs here did not agree to the service request. The communications between DRIVE and the relevant RLECs after receipt of the ROFR requests are ambiguous. Consistent with Commission precedent, an ambiguity in the commitment of a LEC to provide the service requested in the ROFR letter is to be construed as a non-agreement to provide the service under the law. *See Petition of Central Bradford Progress Authority For A Declaratory Order Regarding Its Construction of Fiberoptic Infrastructure In Bradford County Is: (A) Not Subject to The Prohibition of 66 Pa. C.S. s 3014(h)(1); AND (B) Not Subject To The Commission's Jurisdiction As A "Public Utility"*, Docket No. P-2018-2642849 (Order entered July 12, 2018)(*Central Bradford Order*) at 4-5.

[5] DRIVE asked the relevant RLECs to deploy broadband service at 50 Mbps downstream to 85% of the local residential consumers and 95% of business consumers in the relevant areas. Throughout the four counties included in the expansion project, there are 113,208 addresses. The expansion project should enable Wireless Internet Service Providers (WISPS) to make broadband service available at a data speed of 50 Mbps or greater to 66,740 (or 59.0%) of them. The expansion project also should enable WISPs using the network to make broadband service available at a data speed of 25 Mbps or greater to 77,962 (or 68.9%) of them. Finding of Fact No. 50.

[6] *See, e.g., Central Bradford Order*.

Also, Chapter 30 is agnostic regarding the technology to be used when deploying broadband service. This conclusion is evident with Chapter 30's definition of broadband as "a communication channel using *any technology* . . ."[7] (emphasis added). Chapter 30 does not require any specific technology to be used when deploying broadband. Rather, the key is that the technology used must be capable of providing or supporting broadband service as defined by the statute. This statement is true whether the broadband service is being deployed by a jurisdictional RLEC or a non-jurisdictional entity like DRIVE.

I agree with the Initial Decision on Remand that this case must be viewed in light of the policy goal articulated in the Code to "maintain universal telecommunications service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas."[8] When doing so, I do not believe it is reasonable to construe Section 3014(h) of the Code in a manner that makes achieving the policy goal more difficult. In my view, requiring "linkage" between the service requested and provided would do just that; create a potential barrier to broadband investment in the Commonwealth.

Date: <u>April 20, 2023</u>   JOHN F. COLEMAN, JR.
                                                              COMMISSIONER

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[7] 66 Pa. C.S. § 3012.

[8] 66 Pa. C.S. § 3011(2).